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IN THE

Supreme Court of the United States

October Term, 1957.

No. 284

GEORGE J. SCHAEFER,

Petitioner,

vs.

MILTON L. GUNZBURG, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN ANSWER TO PETITIONER'S REPLY BRIEF.

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I.

Petitioner's Original Complaint Stated an Action Cognizable in Equity and a Jury Trial Was Not Required.

In the normal course of events we would not consider answering a Reply Brief. However, the circumstances here are extraordinary in that Petitioner has filed a Reply Brief so filled with distortions and misstatements, not only of Respondents' position but of the holding of the

Court of Appeals below and of this Court in another case, we feel it our duty to reply.[1]

Petitioner has persistently sought to represent that Respondents have in some way acknowledged that Petitioner in his original complaint pleaded a cause of action cognizable at law in which he was entitled to a trial by jury.

The fact is that Respondents have consistently averred that Petitioner has pleaded a "bill in chancery, in which all damages could be assessed and traditionally have been assessed by the Chancellor as an incident to the equitable remedy" [R. 1830; Respondents' Brief in Opposition pp. 9-11].

Just as persistently as he has claimed (without any basis in fact) some concession by Respondents as to his unsubstantiated assertions, Petitioner has as obstinately ignored the prevailing rule in California (which is also the rule generally applied in all jurisdictions) enunciated

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[1] In his footnote 2 on page 4 of his Reply Brief, Petitioner exceeds the bounds of fair statement. He withdraws his equitable claim for an accounting of partnership profits from the side of equitable relief and in some manner adds it to his claim for damages. He then declares that a claim for equitable relief will afford only a dissolution of an inoperative business and a share of assets consisting primarily of obsolete and discarded equipment. Petitioner cites no reference for this gratuitous statement, and there is none. But even more shocking is the fact that the equitable relief prayed for in the complaint is for a conveyance to him of a one-half interest of all the partnership assets; in paragraph 35 of his original complaint [R. 25] he alleged that these assets will produce future profits of between $6,000,000.00 and $8,000,000.00; in his Reply Brief in this Court he now says that they consist "primarily of obsolete and discarded equipment."

in *Johnstone v. Morris*, 210 Cal. 580, 583, 292 Pac. 970, 972 (a case frequently cited by Petitioner):

> "It is an almost, if not universally, accepted rule, that in the absence of statutory permission, an action at law as distinguished from an action in equity cannot be maintained between partners with respect to partnership transactions. It is also well settled that the mere fact a dissolution of the partnership has taken place before the action is brought does not change the rule that no action at law can be maintained between partners. (See exhaustive annotation 'Actions at law between partners and partnerships,' 21 A. L. R. 21, particularly at pp. 34 and 84.) But to this rule no action at law will lie between partners, even after dissolution, there is one well-recognized exception. Where a partnership has been dissolved by one partner purchasing the other partner's interest under a give or take proposition without a full and complete accounting, and later the purchasing partner discovers that the selling partner was guilty of fraudulently hiding assets or misappropriating partnership funds during the existence of the partnership, the purchasing partner may elect to rescind the purchase and sue for an accounting in equity, or he may affirm the purchase and sue at law for damages suffered by virtue of the fraud and deceit. . . ."[2]

There is, of course, no claim of purchase of a partnership interest here.

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[2]For later California cases stating the general rule that an action between partners lies in equity, see *Martyn v. Leslie*, 137 Cal. App. 2d 41 at 61; par. 15, 290 P. 2d 58; *Stowe v. Matson*, 94 Cal. App. 2d 678, 683, 211 P. 2d 591 (hearing by Supreme Court denied). For a statement of the general rule and the limited nature of the exceptions therein see annotation in 168 A. L. R. 1088 beginning at IV, page 1091 to 1106.

Petitioner has never pointed out to this Court wherein *his particular pleadings* brings this case within any of the established exceptions to the general rule that actions between partners lie in equity for an accounting and dissolution; nor can he do so under the record here.

The failure of Petitioner to demonstrate that his particular pleading comes within an exception to the general rule obtaining in California and elsewhere (as stated by the cases cited in the footnote above) is vividly illustrated in his Brief. On page 7 thereof he quotes from *Zimmerman v. Harding*, 227 U. S. 489, 494-495 (which he has cited many times) as follows:

> ". . . if one member assumes to dissolve a partnership *before the end of the term*, the other may bring an action for damages for the breach, and recover not only his interest, but *also his share of the profits which might have been made during the term*. He need not wait until the expiration of the period, and need not go into equity for an accounting, but *may at law show the probable profits which he has been deprived of*." (Emphasis added.)

Petitioner has overlooked the fact that in this case *there is no term* for the alleged partnership *pleaded* either in the original or amended complaint [R. 3-40, 58-66]. This being so, under the statutory law of California, under the California decisions, and under the law obtaining generally in the United States, as enunciated by this Court —if there had been a partnership, it was a partnership

at will, and Respondent was free to dissolve it at any time. California Corporations Code:

"Section 15031. *Causes of dissolution.* Dissolution is caused:

"(1) Without violation of the agreement between the partners.

* * * * * * * *

"(b) By the express will of any partner when no definite term or particular undertaking is specified."

Maryland Casualty Company v. Little, 102 Cal. App. 205, 210, 282 Pac. 968;

McCauley v. Eyraud, 87 Cal. App. 121, 123, 261 Pac. 760;

Karrick v. Hannaman, 168 U. S. 328, 333-334:

"It is universally conceded that a contract of partnership containing no stipulation as to the time during which it shall continue in force does not endure for the life of the partners, or of either of them, nor for any longer time than their mutual consent, may be dissolved by either partner at his own will at any time."

The original complaint here obviously pleads a partnership at will. Hence, there could be no claim of wrongful dissolution during the term. Thus as a matter of law, Petitioner's remedy would lie in equity under the general rule.

Hooper v. Barranti, 84 Cal. App. 2d 570 at 578, par. 6, 184 P. 2d 688.

Petitioner seeks to distinguish *Clark v. Wooster*, 119 U. S. 322, cited in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48, (to the effect that the Seventh

Amendment has no application to cases where recovery of money damages is an incident to equitable relief, even though money damages may have been recovered at law), by flatly asserting:

> "And in *Clark v. Wooster*, the *only* claim there asserted was in equity to enjoin infringement of a patent." (Pet. Reply Br. p. 11; Emphasis supplied.)

Petitioner adds in his footnote 3 on the same page:

> "Had plaintiff in the *Clark* case sought money damages in *addition to* or alternatively with her suit for an injunction, it is beyond question that that claim would have been legal in character and would not have been 'incidental' to her equity claim for jury trial purposes. (*Leimer v. Woods*, 8 Cir., 196 F. 2d 828, 883; *Relph Blechman, Inc. v. Kleinert Rubber Co.*, S. D. N. Y., 98 Fed. Supp. 1005, 1006.)"

As against Petitioner's *representation*, we quote directly from *Clark v. Wooster*, *supra*, at p. 323:

> "This is a suit on a patent, brought by Wooster, the appellee, against the persons composing the firm of Johnson, Clark & Co., of New York, to restrain them from infringing the patent, *and to recover profits and damages*." (Emphasis supplied.)

In the light of the parallel between Petitioner's original complaint here in which he asks for an injunction, profits, and damages, and the bill in *Clark v. Wooster*, *supra*, in which plaintiff there sought an injunction, profits, and damages, and in the light of the *holding* of this Court in *Clark v. Wooster*, *supra*, it must be concluded that Petitioner's argument, based on a non-existent distinction in

Clark v. Wooster, supra, is not only insupportable, but is directly contrary to the holding of this Court. The conclusion seems inescapable: equity, having properly obtained jurisdiction of Petitioner's complaint under his many claims for equitable relief, can properly dispose of his claim for damages as an incident thereof.

In our Brief in Opposition (pp. 14-17) we demonstrated why the Petitioner was mistaken in alleging a conflict in the decisions of the Circuits and in attempting to rely on the alleged conflict as a basis for granting certiorari. We deem it significant that Petitioner does not attempt to refute our analysis in his reply brief.

In fine, this case involves nothing more than the application of well settled principles of law to the particular allegations of the pleadings involved in an isolated piece of litigation. The two courts below, construing the long and involved allegations of the Petitioner's original complaint [R. 4-40], agreed that, under settled rules, the case was one cognizable at equity. Nothing would be gained, either in the way of settling a conflict between Circuits (since there is none) or in framing a principle of general applicability, by further review of this case.

II.

Petitioner's Amended Complaint Not Only Expressly Altered and Modified the Allegations, Issues and Relief Sought in the Original Complaint, but It Also Abandoned Any Claim for Damages Except by Way of a Completely New Cause of Action Not Contained in the Original Complaint. However, Petitioner Did Not Renew His Demand for a Jury Trial in His Amended Complaint. Accordingly, Under Accepted Principles of Law Petitioner Lost Any Right to a Jury Trial by His Failure to Renew His Demand for One.

Petitioner begins his argument under Point III of his Reply Brief (p. 16) by asserting that Respondents reluctantly recognized that the original complaint sustained Petitioner's demand for a jury trial and belatedly argued waiver.

Respondents have *never*, reluctantly or otherwise, recognized in any way that the original complaint sustained a demand for a jury trial. Nor have Respondents, belatedly, or otherwise, heretofore argued waiver. The Court is respectfully referred to page 18 of Respondents' Brief in Opposition which contains Respondents' entire statement on this subject, which could not possibly support, under any circumstances, the claims made by Petitioner.

Petitioner then states, in disregard of the record: "As the Record shows [R. 58] the amended complaint merely abbreviated but did not alter or modify the allegations of the original Complaint; and it merely restated, but did not change, the issues raised by the original Com-

plaint, as to which a jury trial had been denied" (Pet. Reply Br. p. 16).

The direct way to demonstrate that Petitioner has seriously and materially misstated the record is to set forth in parallel columns the corresponding provisions of the original and amended complaint. For the convenience of the Court this is done in the Appendix at the end of this brief.

The Court will at once observe from such comparison that in the original complaint the services of the alleged partners were to be non-exclusive. No such provision appears in the amended complaint. The profits of the alleged partnership in the original complaint were claimed to be subject to a percentage interest of one Joe Biroc. The amended complaint contains no reference to Joe Biroc.

In the original complaint, the alleged breach of the alleged contract is asserted to be by Milton L. Gunzburg. In the amended complaint the alleged breach is asserted to be by Milton L. Gunzburg on behalf of himself and all other defendants.

The claim for damages in the original complaint is against Milton L. Gunzburg *alone* for a sum of at least $3,500,000, with interest from on or about March 30, 1953. There is *no* claim for money damages whatsoever in the amended complaint's First Cause of Action, which is the only counterpart of the original complaint. The only claim for damages in the amended complaint appears

in a new Second Cause of Action in the form of a common count; and then it is a claim for $2,000,000 against *all* of the defendants, with interest from April 7, 1953.[3]

Petitioner has impliedly conceded, and quite correctly (see *Pallant v. Sinatra*, 7 F. R. D. 293; *Fid. & Dep. Co. of Maryland v. Krout*, (C. A. 2d), 157 F. 2d 912, 914; and by analogy, 5 Moore's Federal Practice, Sec. 38.44, p. 341), that if he altered or modified the allegations of his original complaint or changed the issues, he was required to renew his demand for a jury trial in connection with his amended complaint (Pet. Reply Br. pp. 16-17). It is patent from a comparison of the original and amended complaint that he did materially alter allegations and issues. Accordingly, since, admittedly, Petitioner did not renew his demand for a jury [R. 58-66, 1832], Petitioner, by his own brief (and by invoking the record) has raised the issue, and established the fact, that he effectively waived any claim to a trial by jury.

Having raised the issue of alteration himself, Petitioner cannot rightfully complain if this Court finds an additional ground for denying certiorari in the alteration of facts and issues revealed by a comparison of the original with the amended complaint.

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[3] Attention should be called to the following misstatement in Petitioner's Brief. We quote: "*The Court of Appeals expressly recognized* that the amendment did not alter the issues or justify the renewal of the jury demand (1832)". (Pet. Reply Br. p. 17.)

What the Court actually said is as follows: "However, about a year after the Court had segregated the issues for trial and had struck the demand for a jury trial, plaintiff filed an amended complaint for the purpose, then stated, and still maintained, of clarifying the original Complaint." [R. 1832.]

Certainly Petitioner can find no license for his quoted statement in this declaration.

We submit Petitioner has worked himself into this inextricable legal quagmire: regardless of what he *says* he pleaded in his original complaint; *he actually went to trial on his amended complaint.* And in the First Cause of Action of his amended complaint he not only asked for an accounting of profits, the impressment of trusts, and asserted he had no adequate remedy at law [R. 64-66], *but he omitted completely any reference to, or prayer for, damages.*

Thus Petitioner went to trial on the First Cause of Action of his amended complaint *solely* on an equitable action for a partnership accounting. There was no claim for damages, coordinate or otherwise, before the Court, and hence nothing on which Petitioner could base a claim for a jury trial had he demanded one—which he did not.

There remains only to note that *re* Petitioner's Second Cause of Action, a common count (the only cause in which he claimed damages, and, patently, a completely new cause of action, not referrable to anything in the original complaint) Petitioner did *not* demand a jury trial. Further, he expressly did *not* appeal with respect to the Second Cause of Action. [See the Opinion of the Court of Appeals, Appendix to Petition for Writ of Certiorari, p. 9, fn. 15; R. 1832, fn. 15].

Certainly, if Petitioner had actually desired a trial by jury, he would not have *omitted* all reference to damages in the First Cause of Action of his amended complaint. And certainly, he would have demanded a jury trial on it and on his common count. Having pursued a course of conduct completely inconsistent with the establishment of a right to a jury trial, at the time of trial, Petitioner can not now recant his choice.

There is, accordingly, an alternative ground on an unassailable basis for sustaining the decision of the Court of Appeals. Consequently, even if Petitioner were otherwise correct in claiming that grounds for certiorari exist (an assertion with which we firmly disagree) relating to the right to a jury trial on the original complaint, this Court would not be required to reach the questions which Petitioner urges in his petition in view of his failure to request a jury trial on the amended complaint. Consequently, no adequate basis exists for granting the Petition for a Writ of Certiorari.

Conclusion.

No reason appearing to warrant review, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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ARTHUR GROMAN,

Of Counsel.

APPENDIX.

A Comparison of the Corresponding Provisions of the Original and Amended Complaints.

Original Complaint	Amended Complaint
"Sixteenth: In such contract it was agreed that plaintiff Schaefer and defendant Milton L. Gunzburg should form and enter into and by the terms thereof, plaintiff Schaefer and defendant Milton L. Gunzburg then and there did form and enter into a partnership for the purpose of commercially exploiting and licensing the manufacture and use of such 3-D camera process for the production of feature and other stereoscopic or three-dimensional motion pictures by various film producers in the motion picture industry and commercially exploiting and selling incidental by-products such as spectacles or viewers necessary to be used by audiences in motion picture theatres and other public places of amusement to see the three dimensional photographical illusion or effect in films made with such 3-D camera process and	"VI. "Commencing on or about March 12, 1951 and continuing to and including on or about April 9, 1951, plaintiff and Gunzburg entered into an oral agreement under and pursuant to which agreement plaintiff agreed to participate jointly with Gunzburg in the commercial exploitation and development of the 3-D process and such other incidental lines of business which might thereafter be developed in connection with the use of said process, and in attempting to arouse interest in said process throughout the motion picture industry so as to cause producers of motion pictures to license from plaintiff and Gunzburg the use of said 3-D process in the production of feature length motion pictures." [R. 60.]

Original Complaint

projected and exhibited at such motion picture theatres and public places of amusement, and the production and commercial exploitation throughout the world of various motion pictures photographed with such 3-D camera process." [R. 8-9.]

"Seventeenth: In such contract, it was agreed that defendant Milton L. Gunzburg should hold and retain as a matter of convenience, solely for the benefit of such partnership enterprise, title to such 3-D camera process inclusive of the physical camera equipment and accessories thereof, and the exclusive patent and licensing rights pertaining thereto; that defendant Milton L. Gunzburg should attend to and render his services in relation to technical developments of such 3-D process; that plaintiff Schaefer should attend to and render his services in relation to the business aspects of the partnership enterprise including the utilization by plaintiff of his

Amended Complaint

Original Complaint

wide business knowledge, unique abilities, experience and contacts in the motion picture industry toward the promotion and furtherance of the commercial licensing and marketing of such 3-D camera process and the uses thereof, that the services to be rendered by plaintiff Schaefer and defendant Milton L. Gunzburg to the partnership business affairs should be non-exclusive and both partners should be free to pursue their other activities and business interests; that plaintiff Schaefer and defendant Milton L. Gunzburg would consult with each other on all matters of business policy negotiations and contracts for the partnership enterprise." [R. 9-10.]

"Eighteenth: In such contract it was further agreed that plaintiff would bear whatever expenses as might be incurred by plaintiff and that defendant Milton L. Gunzburg would bear whatever expenses as might be incurred by such defendant Milton L. Gunz-

Amended Complaint.

Original Complaint.	Amended Complaint.
burg, subject to the rights of both partners to a re-appraisal at a later date of their respective expenditures on behalf of the partnership enterprise and any reciprocal adjustments as might then be warranted." [R. 10.]	
"Nineteenth: In such contract it was further agreed that the net profits of the partnership enterprise would be divided in equal shares between plaintiff Schaefer and defendant Milton L. Gunzburg, subject only to the disposition of small percentage interests in the profits which defendant Milton L. Gunzburg represented to plaintiff Schaefer that he promised to make to compensate Friend Baker, the aforementioned camera engineer, for services previously rendered by him in connection with developments of such 3-D camera process, to compensate one Ray Russell Heinz for services previously rendered by him as production manager for defendant Milton L.	VII. "Under and pursuant to said oral agreement, it was further agreed that plaintiff and Gunzburg should share equally in all of the profits and proceeds received by either of them, or by any corporation or corporations to be formed by them or either of them, from the licensing, exploitation and development of said 3-D process, from the sale to third persons of any interest therein, and from any incidental lines of business which might thereafter be developed in connection with the the use of said process, subject only to such payments as Gunzburg might be obligated to make and should make in percentages of the profits to Friend Baker, Ray Russell

Original Complaint	Amended Complaint
Gunzburg, in connection with the making of certain experimental three-dimensional motion pictures with such 3-D camera process; and to compensate one Joe Biroc for services previously rendered by him as cameraman in connection with the photographing of such experimental three-dimensional motion pictures, and to compensate defendant Julian Gunzburg, an ophthalmologist and brother of defendant Milton L. Gunzburg, for what defendant Milton L. Gunzburg represented and characterized to plaintiff as a great contribution which defendant Julian Gunzburg had made in relation to the optical phases in the developments of such 3-D camera process. In this connection it was agreed, and defendant Milton L. Gunzburg specifically assured plaintiff, that in no event would the disposition of such small percentage interests in the net profits to such other four persons exceed an ag-	Heinz, and Julian Gunzburg, or any of them, such payments not to exceed 50% of said profits and proceeds." [R. 60-61.]

Original Complaint	Amended Complaint
"gregate of Fifty (50%) Per Cent of the net profits." [R. 10-11.]	
"Thirty-six: Defendant Milton L. Gunzburg breached the aforementioned partnership contract between such defendant Milton L. Gunzburg and plaintiff, Schaefer, and violated plaintiff's rights by virtue thereof, in that * * *." See also Paragraphs Thirty-seventh through Forty-second. [R. 25-34.]	XIII. "On or about April 7, 1953, Gunzburg, acting on behalf of himself and of all of the other defendants herein, breached said oral agreement hereinabove referred to in paragraphs VI and VII hereof in that on said date Gunzburg for the first time repudiated and denied the existence of said oral agreement and failed and refused to account or to render an accounting to plaintiff under said oral agreement for and of the profits and proceeds received by defendants, and each of them, on account of the matters hereinabove set forth." [R. 64.]

Prayer

"10. That it be adjudged that defendant Milton L. Gunzburg should account to plaintiff Schaefer for all assets, profits and effects of such partnership enterprise, including all assets, profits and effects of such partnership enterprise, wrongfully diverted to defendants Vera Gunzburg, Julian Gunzburg, Samuel J. Gunzburg, Rose Berch, Natural Vision Corporation, Natural Sound Corporation and Natural Vision Theatre Equipment Corporation, as well as any and all secret gains made therewith; and that it be adjudged that defendant Milton L. Gunzburg is a trustee ex-maleficio in respect to the aforementioned assets, profits and effects as well as secret gains of such Natural Vision partnership enterprise, for which he is accountable to plaintiff;" [R. 37.]

Prayer

"1. That it be adjudged and declared that defendants, and each of them, have received profits, proceeds and assets in which plaintiff owns a 50% interest, subject only to deduction therefrom for his proportionate share of profits and proceeds actually paid for consideration to Ray Russell Fleinz, Friend Baker and Julian Gunzburg, and that defendants, and each of them, hold all such profits, proceeds and assets in trust for plaintiff to the extent of his interest therein as aforesaid.

"2. That defendants, and each of them, be required to account to plaintiff and to render an accounting to him for and of all profits, proceeds and assets received by them, or any of them, from and on account of the marketing, licensing and exploitation of said 3-D process, and from any incidental lines of business developed in connection therewith including, but without being limited thereto, the resale of polarized spectacles or viewers.

Prayer

"15. That it be adjudged that defendant Milton L. Gunzburg pay plaintiff damages in the sum of at least Three Million Five Hundred Thousand ($3,500,000) Dollars, together with interest thereon from on or about the 30th day of March, 1953." [R. 39.]

"16. That pending the trial of this action, and permanently thereafter, all defendants be enjoined from collecting, receiving, or in any way interfering or meddling with or disposing of the assets, proceeds, profits or other property or effects of such Natural Vision partnership, enterprise, in-

Prayer

"3. That Natural Vision Corporation, Natural Sound Corporation and Natural Vision Theatre Equipment Corporation, and each of them, be adjudged dissolved, and that all of the assets thereof be ordered sold and that the proceeds of said sale be divided equally between plaintiff and defendant Milton L. Gunzburg.

"4. That plaintiff have judgment against defendants, and each of them, in the amount of $2,000,000.00, together with interest thereon at the legal rate from April 7, 1953.

"5. That plaintiff have judgment against defendants, and each of them, for his costs of suit incurred herein, that he have execution for said costs, and that he have such other and further relief as to the court may seem proper." [R. 65-66.]

Prayer

cluding any secret gains made therewith, in their possession or control, and from conducting any business activities whatsoever." [R. 39.]

"17. That it be adjudged and directed that pending the trial of this action and thereafter, a receiver be appointed in respect to the aforementioned assets, profits and effects of such Natural Vision partnership enterprise, including all assets, profits and effects of defendants Natural Vision Corporation, Natural Sound Corporation and Natural Vision Theatre Equipment Corporation, with the usual powers and duties of a receiver." [R. 39.]

Prayer

NOTE: that the above constitutes the entire Prayer of the Amended Complaint and that there is no prayer for damages in connection with the first cause of action, which is the cause purportedly merely abbreviating the original complaint. Prayer 4 set forth immediately above relates to a wholly new cause of action, a common count, set forth for the first time in the Amended Complaint, and referable to nothing in the original Complaint.